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7 Attorney for Plaintiff
8 TRICOR AMERICA, INC.

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 TRICOR AMERICA, INC., a California
12 corporation,

13 Plaintiffs,

14 vs.

15 DHL CANADA EXPRESS, LTD. a Canadian
16 corporation; LOOMIS CANADA HOLDING
17 COMPANY, INC., a Canadian corporation; and
18 DOES 1 through 25, inclusive.

19 Defendants.

Case No.: C07 4949 CRB

PLAINTIFF TRICOR AMERICA,
INC.'S SEPARATE STATEMENT
OF UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND IN
THE ALTERNATIVE MOTION
FOR SUMMARY
ADJUDICATION;
MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF

Date: June 27, 2008

Time: 10:00 a.m.

Courtroom: 9

[Declarations of Laura Each
Nguyen, Andy Sun, Richard Cruz,
and John Marticio; Statement of
Uncontroverted Facts and
Conclusions of Law filed

concurrently herewith]

Pursuant to Northern District of California Local Rules, Plaintiff Tricor America, Inc. ("Tricor") hereby submits the following Statement of Uncontroverted Facts and Conclusions of Law in support of its Motion for Summary Judgment

STATEMENT OF UNCONTROVERTED FACTS

<u>UNDISPUTED MATERIAL FACT</u>	<u>SUPPORTING EVIDENCE</u>
1. Tricor America, Inc. is a California corporation engaged in the business of transporting packages throughout the United States.	Declaration of Scott Tanaka ¶ 3; Declaration of John Marticio ¶ 3; Declaration of Rick Cruz ¶ 3.
2. Loomis is a Canadian company engaged in the business of transporting packages throughout Canada	Declaration of Scott Tanaka ¶ 4; Declaration of John Marticio ¶ 4; Declaration of Rick Cruz ¶ 4
3. DHL Canada is a Canadian company engaged in the business of transporting packages throughout Canada.	Declaration of Scott Tanaka ¶ 5; Declaration of John Marticio ¶ 5; Declaration of Rick Cruz ¶ 5
4. In or about 1984, Tricor America, Inc. and Loomis Courier entered into an agreement to provide courier services to each other at specified rates. The	Declaration of John Marticio ¶ 6; Declaration of Rick Cruz ¶ 6

1	agreement did not have any specific	
2	term and could be terminated by either	
3	party at any time.	
4	5. Tricor and Loomis performed	Declaration of John Marticio ¶ 7;
5	services for one another pursuant to this	Declaration of Rick Cruz ¶ 7
6	agreement for more than twenty years.	
7	6. In or about 2004, Loomis was	Declaration of Scott Tanaka ¶ 8;
8	acquired by DHL.	Declaration of John Marticio ¶ 8;
9		Declaration of Rick Cruz ¶ 8.
10	7. Once Loomis was acquired by	Declaration of Scott Tanaka ¶ 9;
11	DHL, DHL raised its rates on Tricor for	Declaration of John Marticio ¶ 9;
12	the work performed by Loomis.	Declaration of Rick Cruz ¶ 9.
13	8. Initially, the rate increases were	Declaration of John Marticio ¶ 10;
14	instituted without any prior notice and	Declaration of Rick Cruz ¶ 10
15	Tricor learned of the rate increases when	
16	it received the invoices.	
17	9. Tricor disputed the initial rate	Declaration of John Marticio ¶ 11;
18	increases and contacted Ben Fan,	Declaration of Rick Cruz ¶ 11
19	Tricor's contact at DHL/Loomis. Ben	
20	Fan advised Tricor that the invoices	
21	were incorrect and instructed Tricor to	
22	short pay the invoices.	
23	10. Tricor followed Ben Fan's	Declaration of John Marticio ¶ 12;
24	instructions and short-paid the invoices.	Declaration of Rick Cruz ¶ 12
25	11. In July 2006, Defendants sent a	Declaration of John Marticio ¶ 13;
26	notice of rate increase to Tricor's Seattle	Declaration of Rick Cruz ¶ 13
27	office. This notice of rate increase	
28	increased rates drastically.	

1 12. In November 2006, Tricor
 2 terminated all services performed by
 3 Defendants on behalf of Tricor and
 4 contracted with another courier
 5 company to perform its work in Canada.

Declaration of Rick Cruz, ¶ 14.

6 13. After cancelling its work with
 7 Defendants, Tricor sent Defendants a
 8 notice of rate increase for the work
 9 Tricor performed for Defendants. The
 10 notice was delivered with the October
 11 2006 invoice and the October 2006
 12 invoice was paid in its entirety.

Declaration of Scott Tanaka ¶ 10, Exh. B; Declaration of Laura Each Nguyen, ¶ 2, Exh. A.

13 14. In December 2006, Tricor billed
 14 Defendants pursuant to the new rate
 15 structure.

Declaration of Scott Tanaka ¶ 11;

16 15. In or about January 2007,
 17 Tricor's accounts receivable manager,
 18 Andy Sun contacted Defendants to
 19 determine when Tricor could expect to
 20 receive payment. Mr. Sun further
 21 advised Defendants that should Tricor
 22 not receive payment forthwith it would
 23 terminate service. Mr. Sun was assured
 24 that payment would be forthcoming.

Declaration of Andy Sun ¶ 7, Exh. B.

25 16. In or about March 19, 2007,
 26 Tricor received payment for the first
 27 invoice issued at the new rates, however
 28 the payment was made in Canadian

Declaration of Andy Sun ¶ 8.

1 currency instead of United States
2 dollars.

4 17. In or about March 26, 2007,
5 Tricor received payment for the second
6 invoice issued at the new rates in full.

Declaration of Andy Sun ¶ 9.

7 18. In March 2007, Andy Sun
8 contacted Defendants and advised them
9 that they had failed to pay the entire
10 invoice and insisted on payment of the
11 remaining amount.

Declaration of Andy Sun ¶ 10;

12 19. In April 2007, Defendants
13 questioned the new rates and expressed
14 concern that the new rates were
15 significantly higher than the prior rates.

Declaration of Andy Sun ¶ 11;

17 20. Defendants continued to use
18 Tricor's services until May 11, 2007,
19 when Defendants terminated Tricor's
20 services for Defendants.

Declaration of Scott Tanaka ¶ 12;

Declaration of Andy Sun ¶ 12;

21 21. Defendants failed to make any
22 further payments to Tricor after
23 February 2007.

Declaration of Andy Sun ¶ 13;

24 22. When Tricor America, Inc. did
25 not receive payment for the work
26 performed, Tricor filed suit.

Declaration of Scott Tanaka ¶ 14;

Declaration of Andy Sun ¶ 14.

27 23. After Tricor filed suit, on
28 December 17, 2008, Defendants filed a

Declaration of Scott Tanaka ¶ 15;

Declaration of Andy Sun ¶ 15.

1 counter-claim which included causes of
2 action for Breach of Contract, Quantum
3 Meruit, and Restitution

4 24. The Counter-Claim sought
5 damages for services provided between
6 June 2006 and January 2007.

Declaration of Scott Tanaka ¶ 16;
Declaration of Andy Sun ¶ 16.

7 25. Tricor did not request any service
8 from Defendants after November 2006.

Declaration of Scott Tanaka ¶ 17;
Declaration of John Marticio, ¶ 15.

10 CONCLUSIONS OF LAW

11
12 1. Tricor America, Inc. was not unjustly enriched by receiving amounts
13 invoiced.

14
15 2. Tricor America, Inc. performed all of its contractual obligations.

16
17 3. Under the terms and conditions of the agreement, both parties had an
18 obligation to pay for the services rendered on their behalf.

19
20 4. Defendants breached the agreement by raising its rates without
21 providing Tricor with notice of the rate increase.

22
23 5. Defendants further breached the agreement by failing to pay amounts
24 due for work performed.

25
26 6. Defendants entered into an accord and satisfaction when they
27 instructed Tricor to short-pay the invoices.
28

1 7. Any claim for amounts due for courier services provided prior to June
2 17, 2006 is barred by the applicable statute of limitations.
3

4 Dated:

Hon. Charles Breyer
United States District Court Judge

7 Submitted By:

8 LAW OFFICES OF LAURA D. EACH, PC
9

10 BY:


11 Laura Each Nguyen
12 Attorney For Tricor America, Inc
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PROOF OF SERVICE BY MAIL

I, Laura Each Nguen, declare as follows:

I am over the age of 18 years, and not a party to or interested in the within entitled action. I am a principal at the Law Offices of Laura D. Each and my business address is 5776 Lindero Canyon Road, D-233, Westlake Village, CA 91362.

On May 19, 2008, I served by mail the following documents:

SEPARATE STATEMENT IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

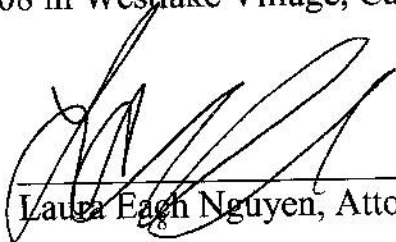
I enclosed a true and correct copy of said document(s), in an envelope via United States Mail, addressed as follows:

Carrie M. Dupic
Robinson & Wood, Inc.
227 North First Street
San Jose, CA 95113

I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. The firm's practice is to deposit mail with the United States Postal Service in Westlake Village, California, on the same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing on the aforementioned date, following ordinary business practice.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on May 19, 2008 in Westlake Village, California


Laura Each Nguen, Attorney at Law